

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.,

Appellant - Defendant and
Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,

Appellee - Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a
corporation,

Appellant - Third Party Defendant.

CLOSING BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

OVERTON, LYMAN & PRINCE

Attorneys for COMPANIA NAVIERA
DE BAJA CALIFORNIA, S. A.

The heart of appellant's appeal is predicated upon the contention that the vessel's unseaworthiness was caused instantaneously with the incident giving rise to plaintiff's injury.

Appellee takes issue with appellant's position on four grounds. We will deal with each point separately.

I

APPELLEE'S POINT I

Appellee justifies Finding No. 3 by a reference to evidence that the flange protruded into the hatch by its own thickness (three-sixteenths of an inch). Logically, this is not what the court had in mind. The ordinary lap of welded plates will protrude by a half inch or so. The court had in mind the protrusion caused when the flange was caught or struck by the pallet or pallet bridle at the time of the casualty.

This is evident by the court's remarks that:

"The flange was not dangerous in and of itself, however. It became so only during the course of a cargo operation." (Tr. Page 111, lines 8-9)

II

APPELLEE'S POINT II

Appellee justifies Finding No. 3 with the argument

that the location of the flange was objectionable. His only support for this argument was a portion of the testimony of witness Hansen that slacking the loads toward the flange was "the only way you can bring the load in"

(Appellee's Brief Page 12.) However, the court rejected this theory saying:

"The court is satisfied that there were undoubtedly other methods of loading which could have been employed with the flange in place, although they may have been slower and more costly."

[Emphasis added.] (Tr. Page 112, Lines 16-19.)

Appellee further argues:

"It was . . . conceded that the two flanges. . . by their very location on the side of the hatch coaming . . . constituted a continuing unseaworthy and unnecessary loading danger and hazard."

(Appellee's Brief Page 12.)

No such concession, as alleged in the last quoted sentence, appears anywhere in the record. Furthermore, the court stated:

"The flange was not dangerous in and of itself" (Tr. Page 111, Line 8); and

". . . it is my view that when he rectified that condition to your satisfaction, that from that time on the loading was not dangerous in and of itself."

[Emphasis added.] (Tr. Page 114, Lines 9-12.)

III

APPELLEE'S POINT III

Appellee claims appellant conceded unseaworthiness. Had that been so, the trial would have been limited to the issue of damages. A close reading of the portions of the record quoted from pages 14-16 of appellee's brief indicates no such concession was made. As counsel for appellant stated:

"Your Honor, I don't have the authority to admit it." (Tr. Page 2, Lines 18-19.)

IV

APPELLEE'S POINT IV

Appellee also contends the vessel was unseaworthy by reason of the method of loading adopted by the stevedore. Appellant dealt with this issue on pages 20-23 of its opening brief.

V

CONCLUSION

WHEREFORE, appellant contends the judgment below in favor of appellee BERNARD A. NORIEGA should be reversed.

Dated: October 25, 1965.

OVERTON, LYMAN & PRINCE
DAN BRENNAN
JEROME O. HUGHEY

By 

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DE BAJA CALIFORNIA, S.A.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Dan Brennan

